PERWIRA AFFIN BANK BHD

v.

ACP INDUSTRIES BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[CIVIL NO: D3-22-1817-98]
11 JULY 2000

CIVIL LAW ACT: *Assignment - Notice of assignment issued before assignment executed - Civil Law Act 1956, s. 4(3) - Whether notice binding upon defendant - Whether there were triable issues*

This was an application under O. 14 Rules of the High Court 1980 by the plaintiff Perwira Affin Bank Bhd by way of summons in chambers to enter judgment against the defendant.

The plaintiff had upon the request of LK Ooi Construction ('borrower') granted it overdraft facilities. One of the conditions of the facilities granted was that the borrower was to execute a deed of assignment, *inter alia,* assigning to the plaintiff all monies due and to become due and payable to the borrower under a contract of works with the defendant. A notice of the assignment dated 3 February 1996 was given to the defendant. However the assignment was only duly executed thereafter, on 8 February 1996. No further notice of the assignment was given to the defendant.

The plaintiffs submitted that even though the notice predated the assignment, there existed a legal assignment since all that is required is for a notice to be given to the defendant, and not the deed of assignment. The plaintiffs relied on the case of *UMW Industries Sdn Bhd v. Ah Fook* and submitted that s. 4(3) of the Civil Law Act 1956 ('CLA 1956') applied.

Held:

[1] It is more than abundantly clear in the case of statutory assignments that there must be an assignment in existence at the time the notice is issued. A notice without the assignment does not invoke the notice provision of s. 4(3) CLA 1956 so as to bind the person liable to the assignor.

[2] It is true s. 4(3) CLA 1956 does not require that a copy of the assignment be given to the person liable to the assignor. The recipient of the notice must normally assume that there is an assignment and act upon it. But once there is evidence that the notice was issued

before an assignment came into existence, the court cannot blind itself to that fact and hold that the notice is binding upon the defendant. Furthermore, no notice was given of the assignment dated 8 February 1996 at any time. The plaintiff clearly has no basis to proceed on any statutory assignment in this case.

[3] If the assignment of 8 February 1996 was to be viewed as an equitable assignment, it would be binding only upon the notice of it having been given to the defendant, and may be required to bring the borrower as a party to the proceedings.

[4] Even if the notice of assignment is held to be within the requirements of s. 4(3) CLA 1956, the progress claims by the borrowers were not endorsed by the borrowers in the terms set out in the notice. It is plain and obvious from the above that the defendant has shown it has more than a triable issue.

[Application dismissed.]

Case(s) referred to:
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246 ***(refd)***
UMW Industries Sdn Bhd v. Ah Fook [1996] 1 CLJ 379 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 14 r. 3

For the plaintiff - KA Gan; M/s Lee Hishamuddin
For the defendant - SJ Lingam; M/s SG Lingam & Co

Reported by Sherin Kunhibava

JUDGMENT

Abdul Wahab Patail J:

By an agreement dated 8 February 1996 ("the loan agreement") the plaintiff Perwira Affin Bank Berhad, upon the request of LK Ooi Construction Sdn. Bhd. ("LKOC"), agreed to grant to the LKOC a banking facility in the nature of overdraft of up to RM3,000,000 ("the said facility"), subject to the terms and conditions which was duly accepted by LKOC.

It was a term of the loan agreement that LKOC as borrower undertakes to execute a deed of assignment ("the said assignment") and assign or cause to be assigned to the plaintiff all monies due and to become due and payable to LKOC, and its rights and interest in to and under a contract of works with the defendant evidenced by letter of award/contract dated

16 November 1995 (Ref: AS/8001/S/LK/95-001), in relation to the construction and completion of a subcontract for main building works for Apartment 3B-1 (Parcel B) to the Proposed Games Village on Lots 5271, 5272 and 5273 and part of Lots 5842 and 2780, Bukit Jalil, Mukim Petaling, Wilayah Persekutuan as security for the payment by LKOC of the said facility ("the contract"). The said assignment was duly executed on 8 February 1996.

A notice of the assignment between LKOC and the plaintiff bank, dated 3 February 1996 was given to the defendant. The defendant failed to remit the sums payable to the plaintiff, notwithstanding a solicitor's letter of 17 May 1998 demanding payment from the defendant of all progress payments due and owing to the plaintiff. The plaintiff filed a writ for a declaration that all progress payments due and owing by the defendant to LK Ooi Construction Sdn Bhd under the letter of award/contract dated 16 November 1995 legally belongs to the plaintiff; and orders that an account of all and further monies due and payable to the plaintiff under the letter of award/contract; that the defendant make payment of such monies found owing and payable within 14 days of taking such account; that the plaintiff be at liberty to correct and surcharge the accounts, and for the defendant to make payment; costs; and such further and other relief as the court thinks fit.

Appearance was entered by the defendant 22 July 1998. The writ was amended on 5 October 1998. On 19 July 1999 the plaintiff filed an application by summons in chambers under O. 14 r. 3 Rules of the High Court 1980 to enter judgment upon the grounds that the defendant has no defence, that there were no triable issues, and upon the grounds stated in the supporting affidavit by one Zainal Hj. Osman. The deponent exhibited amongst other things the loan agreement between the plaintiff and LKOC dated 8 February 1996 (exh. A1), a deed of assignment dated 8 February 1996 between LKOC as assignor and the plaintiff as assignee (exh. A2), a letter to ACP Industries Bhd (exh. A4) as follows:

Our ref: LKOC/Chai/jas

Date: 3 February 1996

ACP INDUSTRIES BHD
(formerly known as Glamour Gateway Bhd)
3rd floor, Building Information Centre
Lot 2, Jalan 51A1243
46100 Petaling Jaya

a Dear Sir

RE ASSIGNMENT OF CONTRACT PAYMENTS BETWEEN
LK OOI CONSTRUCTION SDN BHD AND ACP INDUSTRIES BHD
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b Please be informed that we have obtained credit facilities from Perwira Affin Bank Bhd would require all progress payments of the above mentioned project to be assigned and remitted directly to the Bank.

Hence, under the agreement, we shall stamp on all our claims with the statement below:

c Payable to

Name of account: L K OOI CONSTRUCTION SDN BHD

Account number: 1129051025

d Address to: Perwira Affin Bank Bhd
(formerly known as Perwira Habib Bank (M) Bhd
Ground floor, Wisma MPSA
Jalan Persiaran Perbandaran
40450 Shah Alam, Selangor

e Tel: 03-5597620/23

Remittance is therefore to be made directly to the Bank.

We further confirm that such payments made by you to Perwira Affin Bank Bhd pursuant to this letter shall be deemed to be payments made to us and
f we shall have no claim against you for such payments.

We apologise for any inconveniçnce caused by this request but we assure you that the arrangement we have entered with Perwira Affin Bank Bhd will enable us to serve your needs more efficiently.

Yours faithfully,
g LK OOI CONSTRUCTION SDN BHD

(sgd)

SIDNEY OOI CHEE LEONG
Executive Chairman

h _____

Please indicate your consent to remit payment to Perwira Affin Bank Bhd by returning the duplicate copy of this letter duly signed and stamped.

i

Signature	(sgd) ACP INDUSTRIES BHD (formerly known as Glamour Gateway Bhd)
Name of Signatory	Khalid Abdul Karim
Designation	Managing Director
Ministry/Department	ACP Industry Bhd

There was no notice issued after 8 February 1996 when the deed of assignment was executed. The plaintiff sought to rely on the notice of 3 February 996. It was submitted for the plaintiff that even though the notice pre-dated the assignment, there was a legal assignment from LKOC for payment by the defendant to the plaintiff, since all that is required is for a notice to be given to the defendant, and not the deed of assignment. The plaintiff relied upon *UMW Industries Sdn Bhd v. Ah Fook* [1996] 1 CLJ 379 FC. It was argued that s. 4(3) of the Civil Law Act 1956 applied.

The conditions laid down by s. 4(3) of the Civil Law Act for a statutory assignment was clearly set out by Chong Siew Fai CJ (Sabah & Sarawak) in *UMW Industries Sdn Bhd:*

1) the assignment must be in writing under the hand of the assignor,

2) the assignment must be absolute and not by way of charge only, and

3) that express notice in writing must have been given to the person liable to the assignor under the assigned chose in action.

It is more than abundantly clear in the case of statutory assignments that there must be an assignment in existence at the time the notice is issued. A notice without the assignment does not invoke the notice provision of s. 4(3) so as to bind the person liable to the assignor. It is true that s. 4(3) does not require that a copy of the assignment be given to the person liable to the assignor. The recipient of the notice must normally assume that there is an assignment and act upon it. But once there is evidence that the notice (exh. A4) was issued before an assignment came into existence, the court cannot blind itself to that fact and hold that the notice is binding upon the defendant.

Nevertheless there was an assignment on 8 February 1996. If a notice is given, it would bind the person liable to the assignor from the time he received the notice. No notice was given of the assignment of 8 February 1996 at any time. It was recognised in *UMW Industries Sdn Bhd* at p. 384 that:

> Notice, however, must be given before the assignee takes out it writ (*Compania Colombiana de Seguros v. Pacific Steam Navigation* Co 1 QB 101 at pp. 127-199) but even then failure to do so will not prevent the assignee from proceeding with its action on the basis that it is an equitable assignee in which case the court may require the assignor to be made a party to the proceedings. In our case presently under appeal, notice was given before the action was commenced.

Thus the plaintiff clearly has no basis to proceed on any statutory assignment in this case. While equitable assignments do not require, as do statutory assignments, notice for its validity as an assignment, notice is clearly desirable, for practical reasons, for putting it into effect. In *UMW Industries Sdn Bhd* (at p. 385) it was held that:

> ... but it is desirable that such notice be given, because until the debtor or guarantor receives the notice, the debtor or guarantor, as the case may be, is entitled to pay the original creditor. Also, the giving of such notice may discourage further equities attaching to the debt or claim being created, and may affect priorities of competing assignments ... .

Thus even if the assignment of 8 February 1996 were to be viewed as an equitable assignment, it would be binding upon the defendant only upon notice of it having been given to the defendant, and may be required to bring LKOC as a party to the proceedings.

In *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246 at p. 249 Hashim Yeop A. Sani SCJ (as he then was) said:

> The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

Even if the notice of assignment (exh. A4) is held to be a valid notice within the requirements of s. 4(3) of the Civil Law Act, it is to be noted the affidavit of Abu Saffian b Abu Bakar (encl. 7) affirmed on 12 August 1999 had exhibited the progress claims by LKOC. The progress claims were not endorsed by LKOC in the terms set out in the notice of assignment as follows:

> Payable to
>
> | | |
> |---|---|
> | Name of account: | L K sOOI CONSTRUCTION SDN BHD |
> | Account number: | 1129051025 |
> | Address to: | Perwira Affin Bank Bhd |

(formerly known as Perwira Habib Bank (M) Bhd
Ground floor, Wisma MPSA
Jalan Persiaran Perbandaran
40450 Shah Alam, Selangor

Tel: 03-5597620/23

It is plain and obvious from the above that the defendant has shown it has more than a triable issue.

This application was therefore dismissed with costs.